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No. 94-1885

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

STATE OF NEW JERSEY,

Petitioner,

v.

EDDIE SAEZ, ORLANDO NAVARRO AND LUIS SAEZ,

Respondents.

On Petition for a Writ of Certiorari
To The Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether this Court should review opinions of the New Jersey state courts which were plainly decided on adequate and independent state grounds utilizing this Court's decisions in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980) for guidance only?

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Orlando Navarro and Luis Saez, respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the New Jersey Supreme Court entered in this case on February 23, 1995.

OPINIONS BELOW

The opinion of the Appellate Division of the Superior Court of the State of New Jersey is reported at 268 N.J. Super. 250, 633 A.2d 551 (App. Div. 1993), and is appended to petitioner's Petition for Certiorari as Appendix B, pp. 6a-44a.

The opinion of the Supreme Court of New Jersey is reported at 139 N.J. 279, 653 A.2d 1130 (1995), and is appended to the petition as Appendix A, p. 1a-5a.[1]

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[1] References to the appendix to the petition for certiorari in this brief will adhere to the form used in the petition itself ("App. ___"). References to the petition itself will be cited as "P___" with the appropriate page number.

JURISDICTION

Respondents submit that this Court lacks jurisdiction under 28 U.S.C. sec. 1257(a), to review any portion of the judgment of the New Jersey Supreme Court. That portion of the New Jersey Supreme Court's opinion which holds that the third party intervention exception to the warrant requirement is not applicable to the facts in the instant case, relies upon the dissenting opinion of the Appellate Division of the Superior Court of New Jersey. App. A, pp. 2a-3a. The dissenting opinion explicitly states that in rejecting the third party intervention doctrine in the instant case, it is utilizing the federal and out-of-state cases cited as "examples," App. B, pp. 31a-35a, ultimately concluding that "this case does not fit neatly into any particular category for Fourth Amendment analysis." App. B, p. 41a. The dissenting judge then specifically states that the police surveillance in the instant case was an unlawful search under the state constitution:

> Utilizing Fourth Amendment cases for guidance, State v. Hempele, 120 N.J. 182, 197-198 (1990), however, I am persuaded that the police surveillance in this case was an unlawful search under Article I, paragraph 7 of the New Jersey Constitution which in some circumstances affords greater protection against government searches that the Fourth Amendment. Id. at 195; State v. Novembrino, 105 N.J. 95, 145 (1987); State v. Hunt, 91 N.J. 338 (1982).

App. B, p.40a. Therefore, because the dissenting opinion of the state appellate court holding the third party intervention doctrine inapplicable to the warrantless search of respondents' premises, upon which the state supreme court expressly relies, plainly rests

upon an adequate and independent state ground, it is not subject to review by this Court. See Arizona v. Evans, ___ U.S. ___, ___, 115 S.Ct. 1185, 1189-90 (1995); Michigan v. Long, 463 U.S. 1032, 1040-41, 103 S.Ct. 3469, 3476-77 (1983).

In the event this Court does not agree that it lacks jurisdiction to review the portion of the judgments below applying the third party intervention doctrine, respondents submit, and petitioner concedes, P 2-3, that several related questions were noted but not addressed by the New Jersey Supreme Court and are thus not subject to review by this Court. Both the majority and dissenting opinions of the Appellate Division agreed that the police surveillance of the respondents' basement constituted a "search" within the meaning of Article I, paragraph 7 of the New Jersey Constitution, see State v. Hempele, supra, and that the warrantless search was not justified by the plain view exception to the warrant requirement.

The New Jersey Supreme Court declined to address those issues since they were not properly before the court on respondents' appeal as of right, pursuant to N.J. Court R. 2:2-1(a)(2), on the basis of the dissent in the Appellate Division. Similarly, any issue dealing with whether the governmental action in the instant case constituted a "search" for constitutional purposes, or the plain view exception, is not subject to review by this Court, since the state court decision plainly rests upon an adequate and independent state ground. See Arizona v. Evans, ___ U.S. at ___,

115 S.Ct. at 1189-90; Michigan v. Long, 463 U.S. at 1040-41, 103 S.Ct. at 3476-77.

STATEMENT OF THE CASE

Respondents adopt the statement of the case contained in the petition for certiorari except to add the following: Contrary to the petitioner's assertion that Investigator Cassidy "did nothing to create the gaps and holes in the wall or to make them more accessible," P 4, in fact, Investigator Cassidy testified at the suppression hearing that he had to hold a piece of broken mirror he had found in the basement over his head to see through a gap located above the furnace in order to make some of his observations. (App. B, at p. 13a) Cassidy further admitted that it would not have been possible to conduct a surveillance of the basement of the residence from outside of the building because the basement windows had been deliberately obscured, having been painted over and covered with towels or sheets. (App. B, at p. 13a)

REASONS FOR DENYING CERTIORARI

POINT I

THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION BECAUSE THE STATE COURTS CORRECTLY APPLIED THIS COURT'S PRIOR DECISIONS IN UNITED STATES V. JACOBSEN AND WALTER V. UNITED STATES IN FINDING THAT THE WARRANTLESS SEARCH OF RESPONDENTS' RESIDENCE WAS NOT JUSTIFIED UNDER THE THIRD PARTY INTERVENTION DOCTRINE.

If this Court disagrees with respondents' jurisdictional argument, supra, and decides that the opinions in question are subject to the Court's jurisdiction, respondents submit that certiorari should be denied because no substantial question is presented in the petition. The opinion of the New Jersey Supreme Court and the dissenting opinion of the appellate court upon which it relies, are no more than a routine application of the well-established parameters of the "third party intervention" doctrine as enunciated by this Court in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980).

Petitioner has requested that certiorari be granted in this matter because, it alleges, the state courts' refusal to extend the third party intervention doctrine to searches involving "ongoing criminal activity" conflicts with the decisions of this Court. P 9. Respondents submit that this Court should deny the petition for certiorari because the state courts correctly applied the third party intervention doctrine as enunciated in United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652 (1984) and Walter v. United States, 447 U.S. 649, 100 S.Ct. 2395 (1980), to the facts in the

instant case. Moreover, contrary to petitioner's expansive declaration, the state supreme court specifically held:

> Although we do not imply that the third-party intervention exception applies only when the informant previously has reduced to possession the objects viewed by law-enforcement officials, we are generally in accord with the dissenting opinion's analysis that described the extended and continuous police surveillance as a significant expansion of the informant's prior observation of the activities conducted in the adjacent basement.

App. A, p. 2a-3a. (emphasis added) Thus the court held that under the facts of the instant case, the third-party intervention doctrine was not available to justify the warrantless search of respondents' residence. App. A, p. 3a.

Respondents urge that even a cursory reading of the petition for certiorari evidences a vain attempt to create some justification for a search that was illegal at its inception because law enforcement authorities inexplicably failed to secure the required warrant prior to conducting the surveillance of respondents' basement. The misapplication of the third party intervention requirement to the facts of the instant search by the majority of the state appellate court was merely a contrivance to uphold the illegal search, and the dissenting opinion relied upon by the state supreme court in rejecting the majority's error, correctly applied this Court's decisions in Jacobsen, supra, Walter, supra, and their progeny.

As explained by this Court in Jacobsen, the Fourth Amendment's protection against unreasonable searches and seizures proscribes only governmental action. The Fourth Amendment is wholly

inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with participation or knowledge of any governmental official. Id. at 112, 104 S.Ct. at 1656. The Jacobsen Court concluded that the search of a package which Federal Express employees had damaged and then examined did not violate the Fourth Amendment because that invasion of the defendant's privacy was occasioned by private persons. The subsequent search conducted by government agents, at the request of the Federal Express employees therefore, did not constitute a "search" within the meaning of the Fourth Amendment, because it did not infringe upon a legitimate expectation of privacy, since a prior invasion of privacy by the Federal Express employees had already occurred. The Fourth Amendment was therefore not implicated because the government agents had not expanded the scope of the initial private invasion. Id. at 120, 104 S.Ct. at 1660.

The Jacobsen Court distinguished the facts of that case from another Supreme Court case in which evidence was suppressed because it was found that the government agents did in fact exceed the scope of the initial private invasion. In Walter v. United States, supra, a majority of the Court concluded that a search conducted by the FBI expanded the scope of the initial private invasion and therefore required a warrant. In Walter, employees of a company opened boxes which had erroneously been shipped to them and discovered rolls of motion picture films, the labeling of which indicated that they contained scenes of homosexual activity. The

employees turned the carton over to the FBI without screening the films. Later, without obtaining a warrant, FBI agents obtained a projector and viewed the films. A majority of the Court agreed that the appropriate analysis of a governmental search which follows on the heels of a private search must be tested by the scope of the antecedent private search. Id. at 656, 100 S.Ct. at 2400. Justice Stevens explained:

> If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances--for example, if the results of the private search are in plain view when materials are turned over to the Government--may justify the Government's reexamination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In this case, the private party had not actually viewed the films. Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

Id. at 657, 100 S.Ct. at 2401.

The Jacobsen majority agreed with Walter, finding that "[w]hen the first federal agent on the scene initially saw the package, he knew it contained nothing of significance except a tube containing plastic bags and, ultimately, white powder." Moreover, "the removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing

that had not previously been learned during the private search." Jacobsen, 466 U.S. at 118-119, 104 S.Ct. at 1659-1660. The Court similarly concluded that the chemical test of the powder did not constitute an unreasonable "seizure" of the package because

> [t]he agents had already learned a great deal about the contents of the package from the Federal Express employees, all of which was consistent with what they could see. The package itself, which had previously been opened, remained unsealed, and the Federal Express employees had invited the agents to examine its contents. Under these circumstances, the package could no longer support any expectation of privacy; it was just like a balloon "the distinctive character [of which] spoke volumes as to its contents--particularly to the trained eye of the officer," Texas v. Brown, 460 U.S. 730, 743, 103 S.Ct. 1535, 1544, 75 L.Ed.2d 502 (1983)(plurality opinion). (other citations omitted).

Id. at 119, 104 S.Ct. at 1660.

In the instant case, the tenant-informant told Investigator Cassidy that she observed people conducting activities in the basement adjoining that of respondents on several occasions, at least once a week, during the course of the previous two months. Although the tenant-informant stated that this activity usually took place at least once a week, there is no indication that it took place on the same day of the week or that it was possible to predict when the activity was likely to occur again. Thus, petitioner's assertion that the criminal activity was "ongoing" is an unwarranted inference. The criminal activity observed by the tenant-informant can most accurately be described as "occassional." Consequently, petitioner's analysis of this issue as our state courts' failure to apply the third party intervention doctrine in

an attempt to thwart the warrantless surveillance of "ongoing criminal activity" is spurious and should be recognized as such.

Indeed, the facts underlying the opinions in question reveal that Investigator Cassidy and the tenant-informant planned to meet in her basement two days after she initially told him what she had observed. Therefore, this is not a case in which a law enforcement official was invited by a private citizen to view "ongoing criminal activity" as it was occurring. At the time Cassidy set up surveillance of the basement, there was no basis to believe there was any "ongoing criminal activity." Cassidy might have observed a myriad of intensely private conduct. It was merely fortuitous that he observed the illegal activity which the informant had described to him two days before the search of respondents' residence.

As correctly observed by the dissenting judge in the state appellate court, what distinguishes the instant case from "third party intervention" cases in general is that, in other cases,

> [t]he breach of privacy by the private searches revealed objects, some of which were illegal. The government agents saw the same objects. Thus, the inspections by the government agents did not expand the scope of the product of the initial private searches.... In the present case, the police were not invited to view specific, immutable objects that the tenant-informant had reduced to possession. The police were invited to participate in the surveillance of a basement and any activities which might occur in that basement during the police surveillance. Because no one could predict with certainty what the police would see, unlike the Jacobsen line of cases, each moment of surveillance was a new invasion of privacy. The basement activities to be seen from the tenant-

> informant's vantage point could have included licit as well as illicit behavior, activities of other members of the suspect's family and even private intimate behavior.

App. B, p. 35a.

In the instant case, Investigator Cassidy's surveillance necessarily exceded the scope of the initial intrusion because he was not invited to view specific, immutable objects, nor was there any indication that the criminal activity would be "ongoing" when the surveillance was conducted. In fact, Cassidy testified that respondent Eddie Saez was not arrested immediately after the search of his basement on May 17, 1990, because Cassidy wanted to conduct additional surveillance of the Saez basement. To that end, Cassidy obtained a key to the informant's residence so he could come and go as he pleased, and returned to the basement approximately ten times after May 17, 1990. While Cassidy observed respondent Eddie Saez and his children at various times during these additional surveillances, he made no further observations of any illegal activity.

The conclusion reached in the opinion of the New Jersey Supreme Court which relies on the dissenting opinion of the state appellate court, is well supported by the facts. Respondents urge this Court to deny the petition for certiorari because the "third party intervention" exception to the warrant requirement is inapplicable and because no substantial question is presented by the petition.

CONCLUSION

For these reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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